UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JODY M. WELCH,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 02-247-P-C***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises several questions, including whether there is substantial evidence in the record to support the commissioner's conclusion that the plaintiff retained the residual functional capacity for light work, whether the commissioner used the Grid improperly, whether the vocational expert's testimony was in error, whether the commissioner properly evaluated the medical evidence and whether the commissioner adequately evaluated the plaintiff's credibility and testimony concerning pain. I recommend that the decision of the commissioner be affirmed.

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on October 27, 2003, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff suffered from status post comminuted mid-shaft fracture of the left femur, now healed and producing little resident dysfunction, status post comminuted fractures of the left tibia and fibula, status post multiple fractures and dislocations of the right foot with residual malunion of the right fifth metatarsal and arthritis, status post intra-articular tibial plateau fracture on the right, now healed and producing early arthritis of the right knee, sacroiliac joint disruption, symphysis pubis disruption, residual bilateral S-1 radiculopathy, status post open displaced fracture of the pelvis, status post possible T-8 and T-9 spinous process fractures, now healed, and status post L-5 compression fracture, now healed, impairments that did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 ("the Listings'), Findings 3-4, Record at 21-22; that as a result of his impairments the plaintiff was limited to the performance of a restricted range of work activity of a light exertional level, with the added inability to use foot controls, climb or walk on uneven surfaces, Finding 7, *id*. at 22; that the plaintiff can climb, balance, stoop, kneel, crouch or crawl only occasionally and must avoid exposure to hazardous machinery and unprotected heights, *id*.; that the plaintiff's allegations concerning the pain he experienced, his symptoms and the functional limitations imposed on him by his impairments were not fully credible and are inconsistent with his described activities of daily living, Finding 8, *id*.; that the plaintiff's impairments prevented him from returning to his past relevant work, Finding 9, *id*.; that, given his age (24) and education (through high school), use of Rule 201.27 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. Part 404 ("the Grid") as a framework for decision-making, warranted a finding that there existed in the national economy in significant numbers other jobs that the plaintiff could be expected to perform, including time keeper, supply clerk, surveillance system monitor and assembler of small products,

Findings 6, 7 & 10, *id*.; and that the plaintiff therefore had not been under a qualifying disability at any time prior to the date of the decision, Finding 11, *id*. The Appeals Council declined to review the decision, *id*. at 5-6, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential evaluation process. At Step 5, the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).[2]

[2] The plaintiff contends, almost in passing, that the report of Dr. Robert Phelps, who examined him at the request of his attorney, "supports a finding that listing 1.04 is met (or at least equaled)." Plaintiff's Itemized Statement of Specific Errors ("Itemized Statement") (Docket No. 5) at 10. Consideration of the question whether an impairment or group of impairments meets or equals any set forth in the Listings occurs at Step 3 of the sequential review process; to meet a listed impairment the plaintiff must present the specific medical findings, consisting of symptoms, signs and laboratory findings, shown in the listing. 20 C.F.R. §§ 404.1525(d), 416.925(d). To be equivalent to a listing, the plaintiff's medical findings must be at least equal in severity and duration to the listing criteria. 20 C.FR. §§ 404.1526(a), 416.926(a). The plaintiff also characterizes Dr. Phelps' report as presenting a medical opinion that the plaintiff's medical condition "met (or at least equalled [sic]) listings in the 1.00 series and the 11.00 series." *Id*. at 11. This argument is too cursory and lacking in specificity to preserve the issue for the court's consideration, but even if that were not the case, the report submitted by Dr. Phelps, Record at 356-80, does not include specific findings that meet or equal the criteria of section 1.04 of the (*continued on next page*)

Discussion

The plaintiff first contends that there is insufficient evidence to support the administrative law judge's conclusion assigning him a residual functional capacity for light work, with certain additional limitations. Itemized Statement at 3. He argues that the administrative law judge wrongly rejected the report of Dr. Phelps and relied on the reports of non-examining physicians employed by the state which can only be interpreted to support a sedentary, rather than light, work capacity. *Id*. The latter contention is based on an assertion that the state evaluators found that the plaintiff had the capacity to stand and walk for only two hours per day, while light work requires the ability to stand and walk for a total of six hours per day. *Id*.

Light work is defined in the relevant regulations as follows:

> Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities.

20 C.F.R. §§ 404.1567(b), 416.967(b). Social Security Ruling 83-10 expands on this definition as follows, in pertinent part:

> "Frequent" means occurring from one-third to two-thirds of the time. Since frequent lifting or carrying requires being on one's feet up to two-thirds of a workday, the full range of light work requires standing or walking, off and on, for a total of approximately 6 hours of an 8-hour workday. Sitting may occur intermittently during the remaining time.

Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service* Rulings (1983-1991), at 29. Both of the state-agency evaluations do include, in the section dealing with exertional limitations,

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Listings, the only section specified by the plaintiff in his itemized statement, or of section 1.02 of the Listings, which (*continued on next page*)

under the heading "Stand and/or walk (with normal breaks) for a total of —," a check in the box next to the option "at least 2 hours in an 8-hour workday." Record at 152, 160. One of the other two alternatives under this heading is "about 6 hours in an 8-hour workday." *Id*.

The administrative law judge in this case did find that the plaintiff's capacity for light work was restricted, but described the restrictions as follows:

> His ability to perform light work activity is further [sic] eroded only as follows. He cannot use foot controls. He is incapable of climbing. He can climb, balance, stoop, kneel, crouch, or crawl only occasionally. He must avoid exposure to hazardous machinery. He cannot walk on uneven surfaces. He must avoid unprotected heights.

Record at 22. In the body of his opinion, the administrative law judge finds the reports of the state-agency physicians "more consistent with the objective medical evidence in this record than is the opinion of Dr. Phelps," and bases his conclusion that the plaintiff is capable of a restricted range of light work "primarily on those opinions." *Id*. at 17. However, at no point does the administrative law judge discuss the limitation of fewer than 6 hours per workday set by both of these physicians on the plaintiff's ability to stand and walk, a critical element of the definition of light work capacity.

The fact that the administrative law judge describes his assessment of the plaintiff's work capacity as being within a "restricted" range of light work rather than as a "full" or "wide" range, the language used by the regulation and the Ruling, does not obviate the error. The degree to which a claimant's ability to perform a full range of work at a specific exertional level is restricted by non-exertional impairments determines whether the Grid may be applied or used only as a framework for decision making. *See, e.g.*, *Rose v. Shalala*, 34 F.3d 13, 19 (1st Cir. 1994); *Frustaglia v. Secretary of Health & Human Servs.*,

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counsel for the plaintiff discussed at oral argument.

829 F.2d 192, 195 (1st Cir. 1987). This consideration has no effect on the question whether there is substantial evidence in the record to support the administrative law judge's conclusion regarding a claimant's appropriate residual functional capacity.

This error is compounded by the fact that two of the four jobs found by the administrative law judge as "jobs the claimant could be expected to perform," Record at 22, are classified as light jobs. The two jobs are supply clerk, identified by the vocational expert as section 339.682-010 of the Dictionary of Occupational Titles ("DOT"),[3] and assembler of small products, identified by the vocational expert as section 739.687-030 of the DOT. *Id*. at 54. Both of these jobs are listed in the DOT as having a strength level of light work. *Dictionary of Occupational Titles* (U. S. Dep't of Labor, 4th ed. rev. 1991) §§ 339.687-010, 739.687-030. The remaining two jobs listed by the administrative law judge — time keeper and surveillance system monitor — are classified in the DOT at the sedentary strength level. *Id*. §§ 215.362-022,[4] 379.367-010. While a finding that a claimant has a residual function capacity for light work necessarily includes the finding that he has a capacity for sedentary work as well, 20 C.F.R. §§ 404.1527(b), 416.967(b), at least one of the two sedentary jobs identified by the administrative law judge in this case suffers from other flaws.[5]

The hypothetical question posed to the vocational expert that generated the testimony concerning these jobs included "an individual who has no skills or semi-skills at all." Record at 54. The administrative law judge's opinion makes no specific reference to the plaintiff's level of transferable skills, although it does note that the plaintiff's past relevant work was unskilled. *Id*. at 20. This means that the plaintiff had no

[3] Counsel for the parties agreed at oral argument that the correct citation for this job is section 339.687-010 of the DOT.
[4] Mistakenly transcribed in the administrative record as section 215.367-022. Record at 54.
[5] The plaintiff does not contend that there is insufficient evidence in the record to support a conclusion that he is capable of at least a limited range of sedentary work.

transferable skills. 20 C.F.R. §§ 404.1568(d), 416.968(d). The job of timekeeper is listed in the DOT as having a specific vocational preparation ("SVP") level of 3. DOT § 215.362-022. This is semi-skilled work. Social Security Ruling 00-4p ("SSR 00-4p"), reprinted in *West's Social Security Reporting Service* Rulings (Supp. 2003), at 245. This job is accordingly inconsistent with the hypothetical question posed to the vocational expert and the administrative law judge offers no explanation for the inconsistency. An explanation is required if the commissioner is to rely on this job. *Id*. at 244; *Swenson v. Sullivan*, 876 F.2d 683, 689 (9th Cir. 1989). The job of timekeeper accordingly provides no support for the commissioner's decision that the plaintiff in this case is capable of doing work that exists in significant numbers in the national economy.

The remaining job, surveillance-system monitor, does have an SVP of 2, DOT § 379.367-010, making it an unskilled job, SSR 00-4p at 245, and thus responsive to the hypothetical question. The plaintiff contends that the job does not exist in significant numbers in the regional economy. Itemized Statement at 6.[6] The vocational expert testified that "350 plus" such jobs are available in the regional economy and over 50,000 in the national economy. Record at 54. A single occupation is sufficient to meet the commissioner's burden at this stage of the sequential evaluation process. 20 C.F.R. §§ 404.1566(b), 416.966(b). Courts have found sufficient numbers of jobs to exist in the local or regional economy at levels lower than 350.

[6] The plaintiff asks the court to "take judicial notice that there are only two public transportation facilities in Maine (the Portland and Bangor airports) large enough to have full time surveillance monitors," Itemized Statement at 6 n.5, and goes on to state, without citation to authority, that "rather than 350 security monitor positions [in the Maine region] there might be about 20 or 30," *id*. at 6. While it is true that the DOT classification involves monitoring the premises of public transportation terminals, DOT § 379.367-010, it is not appropriate for the court to take judicial notice of the plaintiff's factual assertion. Nor may the court accept the plaintiff's estimate of the number of such jobs in Maine without any supporting authority. *See Maine v. Norton*, 257 F.Supp.2d 357, 373 (D. Me. 2003) (judicial notice permits court to consider generally accepted or readily verified facts as proved; fact must be one not subject to dispute and capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.) Furthermore, the plaintiff misstates the vocational expert's testimony. She testified that there were 350 such jobs in the "regional economy," not in Maine. Record at 54.

E.g., Craigie v. Bowen, 835 F.2d 56, 58 (3d Cir. 1987) (200 jobs in region); *Allen v. Bowen*, 816 F.2d 600, 602 (11th Cir. 1987) (174 jobs in local area; 1,600 jobs statewide; 80,000 jobs nationwide). *Cf. Salas v. Chater*, 950 F. Supp. 316, 320 (D. N.M. 1996) (133 jobs in state not significant number where plaintiff faced real obstacles in getting to and from work); *Mericle v. Secretary of HHS*, 892 F. Supp. 843, 847 (E.D. Tex. 1995) (870 jobs in state of Texas not significant number where state is second most populous in country and plaintiff incapable of traveling far distances); *Jimenez v. Shalala*, 879 F. Supp. 1069, 1076 (D. Colo. 1995) (250 jobs across state not significant number). The commissioner took the position at oral argument that the existence of more than 50,000 nationally was sufficient to meet the "significant number" requirement, regardless of the number of jobs available regionally. The regulations support this position. 20 C.F.R. §§ 404.1561, 416.961 (jobs must exist in significant numbers in national economy, either in the region where claimant lives or in several regions of the country); 404.1566(a), 416.966(a) (it does not matter whether work exists in the immediate area in which claimant lives). I conclude, particularly in the absence of evidence showing that the plaintiff is unable to travel, that the existence of 350 or more jobs in the region and more than 50,000 nationally is sufficient to meet the "significant number" requirement. Accordingly, the plaintiff is not entitled to remand on the basis of the administrative law judge's error concerning residual functional capacity.[7]

The plaintiff also challenges the administrative law judge's use of the Grid as a framework for decision making, Itemized Statement at 8-9, but in light of my conclusion that the evidence in the record

[7] For the same reasons, the plaintiff's arguments concerning the alleged inconsistency between the administrative law judge's hypothetical questions to the vocational expert and his findings, Itemized Statement at 5, do not require reversal.

supports the finding that there is an occupation with a significant number of available jobs at the sedentary exertional level which the plaintiff may perform, that contention appears moot.[8]

The plaintiff next argues that the administrative law judge could not "prefer" the evaluations of the state-agency physicians to that of Dr. Phelps, who examined him at the request of his attorney. Itemized Statement at 11. To the contrary, the administrative law judge complied with 20 C.F.R. §§ 404.1527(d) and 416.927(d), the regulations cited by the plaintiff, in deciding to discount Dr. Phelps' report. He stated that he found the reports of the state-agency physicians to be more consistent with the objective medical evidence in the record than that of Dr. Phelps. Record at 17. The regulation states that the commissioner will give more weight to an opinion that is more consistent with the record as a whole. 20 C.F.R. §§ 404.1527(d)(4), 416.927(d)(4). While other sections of the regulation allow the commissioner to give more weight to the opinion of a physician who has examined the claimant than to that of one who has not, *id*. §§ 404.1527(d)(1), 416.927(d)(1), and to give more weight to the opinion of a specialist than to that of one who is not, *id*. §§ 404.1527(d)(5), 416.927(d)(5), nothing in the regulation requires that any one subsection of the rule prevail over the others. The plaintiff is not entitled to remand on this basis.[9]

Finally, the plaintiff complains at length about the administrative law judge's evaluation of his credibility and his findings concerning the plaintiff's subjective pain. Itemized Statement at 14-19.

[8] The plaintiff argues that the commissioner's decision must be reversed because the administrative law judge failed to "give notice of the intention to take official notice of the fact that the claimant's non-exertional impairments do not significantly erode the occupational base noticed in the grids and provide the claimant an opportunity to offer evidence and argument in opposition to this conclusion," citing *Sykes v. Apfel*, 228 F.3d 259 (3d Cir. 2000). Itemized Statement at 9. Opinions of the Third Circuit are not binding in this district in any event, and the plaintiff's argument mischaracterizes the holding in *Sykes*, which is also easily distinguishable on its facts. 228 F.3d at 273. The plaintiff is not entitled to remand on this basis.

[9] The plaintiff also argues in conclusory fashion that the administrative law judge was required to develop the record further or to identify other medical evidence demonstrating why he rejected Dr. Phelps' conclusions "if [he] did not understand why Dr. Phelps had reached the conclusions that he did." Itemized Statement at 13. There is no indication in the record that the administrative law judge lacked such an understanding. In any event, nothing in the regulation cited (*continued on next page*)

However, the administrative law judge's discussion on this point, Record at 17-20, while not extensive, is minimally sufficient under *DaRosa v. Secretary of Health & Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986), and Social Security Ruling 96-7p. Contrary to the plaintiff's contentions, the administrative law judge did not fail to consider his complaints of pain; the opinion complies with *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 21 (1st Cir. 1986).

Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 31st day of October, 2003.

_____
David M. Cohen
United States Magistrate Judge

Plaintiff

JODY M WELCH represented by **FRANCIS JACKSON**
JACKSON & MACNICHOL
85 INDIA STREET
P.O. BOX 17713

by the plaintiff required the administrative law judge in this case to make further inquiry.

PORTLAND, ME 04112-8713
207-772-9000
Email: mail@jackson-macnichol.com

V.

Defendant

SOCIAL SECURITY ADMINISTRATION COMMISSIONER

represented by **JAMES M. MOORE**
U.S. ATTORNEY'S OFFICE
P.O. BOX 2460
BANGOR, ME 04402-2460
945-0344
Email: jim.moore@usdoj.gov

KAREN BURZYCKI
ASSISTANT REGIONAL COUNSEL
OFFICE OF THE CHIEF COUNSEL, REGION 1
Room 625 J.F.K. FEDERAL BUILDING
BOSTON, MA 02203
617/565-4277
Email: karen.burzycki@ssa.gov